Supreme Court, U.S.
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No. 93-1265

IN THE
Supreme Court of the United States

October Term 1993

GARY L. DOUGHARTY
Petitioner

v.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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I. QUESTIONS PRESENTED

1. Whether a military commander exercising discretion to discharge a military member in an adverse personnel action must set forth reasons in writing stating the basis for the exercise of discretion?

2. Whether the Courts below should have found that the Army breached its own regulation and published procedure in admitting counseling forms after a lateral transfer between units and should have set aside Dougharty's discharge?

II. LIST OF PARTIES

Petitioner is Gary L. Dougharty, a resident of the State of Washington residing at Tacoma.

Respondent is the United States of America.

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GARY L. DOUGHARTY
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v.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The Petitioner Gary L. Dougharty respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Apeals for the Federal Circuit entered on November 9, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit,

reported at ___ F.3rd ___, appears in Appendix A, p. 1, to this petition. The opinion of the trial court, the United States Court of Federal Claims, dated January 8, 1993, is reported at 27 Fed.Cl. 436 and appears in Appendix A, pp. A-2 through A-34, to this petition. The judgment of the trial court appears in Appendix A, p. A-35, to this petition.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Federal Circuit was entered on November 9, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Rule 10 of the United States Supreme Court Rules.

REGULATORY PROVISIONS INVOLVED

The following Army Regulations ("AReg" chosen as the designation so as not to confuse with the designation "AR" which means "administrative record") are at issue in this case. The relevant portions are contained in Appendices B and C.

AReg 635-200, ch. 1, Sec. II, 1-18

AReg 635-200, ch. 2, Sec. III, 2-6

STATEMENT OF THE CASE

This is a military backpay claims case wherein Gary L. Dougharty, the Petitioner herein, sought review of the processing leading up to his discharge from the U. S. Army and an order reinstating him to active duty.

Dougharty was a career soldier having enlisted in the U. S. Army in 1975 and serving continuously on active duty for approximately 16 years until his

administrative discharge on November 7, 1991. He attained the rank of Sergeant, pay grade E-6, and was a "Patient Administration Specialist". (JA 3, 219, 222) (1) At the time of his administrative discharge he was assigned to the Headquarters Company, Second Battalion, First Infantry Regiment ("HHC") at Fort Lewis, Washington. (JA 60, 216, 218).

In early 1989 Dougharty began going through a divorce from his then wife, Cheryl. As a result of a domestic disturbance between the two wherein Dougharty held an unloaded gun to his wife's head, Dougharty was charged on January 15, 1990, with assault under the laws of the State of Washington. On March 11, 1990, he pled guilty to a charge of Third Degree Assault and

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(1) "JA" refers to the Joint Appendix in the Federal Circuit.

was sentenced to 15 days in jail. This is the only criminal conviction Dougharty has ever had. Two other alleged criminal charges against Dougharty during this time of divorce were dismissed. Dougharty was divorced from Cheryl in July, 1990. (JA 195)

In early 1990 Captain McBride, Dougharty's then superior at the 423rd Medical Company at Fort Lewis, notified Dougharty that he intended to initiate administrative board proceedings leading to discharge with respect to this one criminal conviction. However, on March 16, 1990, McBride decided to halt this processing. (JA 36)

Dougharty received a lateral transfer from the 423rd Medical Company to the HHC on October 2, 1990. (JA 216). Between July 1990 and October Dougharty received adverse counseling "chits" (DA Form 4856--see App. D for

the form). After this lateral transfer and into January, 1991, Dougharty received more adverse counseling "chits". (JA 27-34, 38-45, & 57).

In January, 1991, Dougharty met his now wife, Cindy, which was a positive event in his life. (JA 196) Also in January he was assigned to work for one Commissioned Warrant Officer Rupe. In January, 1991, the first of eight consecutive counseling "chits" through August 1991 rating Dougharty in the "Outstanding" category of performance was ascribed to him by Officer Rupe.

After Dougharty's assignment to Rupe, Captain J. Sladen Bradley assumed command of the HHC on January 28, 1991, and on that very same day Bradley gave notice to Dougharty that he intended to process Dougharty for discharge. (JA 27-28), but he prepared no formal papers.

Dougharty had no formal or informal

disciplinary problems between January and April 1991. However and notwithstanding that Dougharty had received three consecutive months of consistently "Outstanding" ratings by this time, Bradley, nevertheless, formally initiated administrative proceedings against Dougharty on April 1, 1991 indicating that he was recommending such action by reason of a "pattern of misconduct." (JA 20-21) Dougharty acknowledged his rights and requested an administrative board. On April 4, 1991, Bradley then recommended a general discharge and indicated that "attempts at rehabilitation would not produce a quality soldier. (sic) adverse impact on military discipline, good order, and morale." (JA 20-21)

On April 8, 1991, Lieutenant Colonel Chiarelli recommended approval of Bradley's recommendation and requested a

"waiver of the rehabilitative requirements of AR635-200, paragraph 1-18." (JA 22) Chiarelli did not state any reason in writing for this request. There is no indication in the record whether Chiarelli ever saw or noted Dougharty's "Outstanding" performance ratings for the three months before this recommendation and request.

On May 13, 1991, an administrative board was convened during which evidence of the one conviction as well as evidence of and for which alleged criminal charges were dismissed by civilian authorities. The various adverse counseling forms between July, 1990, and early January, 1991, also came before said board, notwithstanding the wording on DA Form 4856 itself. The said board found "That SSG Dougharty did engage in misconduct by his discreditable involvement in at least two incidents with civil authorities, his

poor duty performance in two distinct units over a period of less than three years and his lack of subordination to authority." (JA 123)

The Board made the following recommendations:

> That SSG Dougharty, Gary L., be separated from the Army for misconduct and his service be characterized as General. That the separation be suspended until 9 November 1991 at which time, unless the suspension is sooner vacated, the approved separation will be remitted. That SSG Dougharty, Gary L., receive a rehabilitative transfer to a unit within the 199th Infantry Brigade (Motorized). (JA 123) (emphasis supplied)

After review of the board proceedings by others, Colonel Windle, the Separation Authority, directed on June 28, 1991, that Dougharty be discharged with a general discharge. Windle did not state any reason in writing for this action. Windle did not state any reason in writing why he waived

the rehabilitation requirements of AReg 635-200. There is no indication in the record whether Windle ever saw or noted Dougharty's "Outstanding" performance from January, 1991, through by this time June, 1991.

Dougharty filed the within action directly in the U. S. Court of Federal Claims as the court of first instance on March 2, 1993. Dougharty filed said action under the Tucker Act, 28 U.S.C. 1491. The Court below held that it had jurisdiction of the case under said statute. (App. A-12). Jurisdiction for the Court of Appeals for the Federal Circuit ("CAFC") is found in 28 U.S.C. 1295 and CAFC Rules 3 and 4. The Per Curiam opinion of the CAFC is set forth in CAFC Rule 36. Jurisdiction was not contested.

REASONS FOR GRANTING THE WRIT

1. Military commanders exercising discretion to discharge a military member in an adverse personnel action should set forth a reason or reasons in writing stating the basis for the exercise of that discretion.

This Petition is of immense importance to the 1,744,440 members of the active duty components of the armed services of the United States. (2) In this era of "down-sizing", the commonly used term in the vernacular for the more formal term "reduction-in-force", of the active duty components, it is of critical importance to the interests of those on active duty that if a reduction-in-force is to be done as to them, that it be done on the basis of reduction-in-force rules and regulations mandating payment for the involuntary action and not under the guise of some other rule and regulation accomplishing the same result without the

(2) As of December 31, 1993, per telephone call to Department of Defense Information Center, January 25, 1994.

military service having to make such payment.

The Courts must take control of this matter to insure that the reduction-in-force policies are followed. Concomitantly, the Courts must insure that when other rules and regulations are used to accomplish involuntary discharges, military commanders must be required to set forth reasons in writing for actions taken in discharge settings so that review of and by Courts will permit judicial scrutiny to determine whether actions taken are nothing more than a disguised reduction-in-force without following reduction-in-force rules and regulations.

During the Fall of 1989 and after the fall of the Berlin Wall, the mission of our military services came under review. The need for personnel on active duty was considerably reduced. The

timing of Dougharty's administrative processing, ostensibly for a "pattern of misconduct", followed immediately, directly, and proximately from the need to reduce forces, even though the said processing was previously halted; even though Dougharty had never received a rehabilitative transfer as required by regulation; even though counseling forms were presented at his board which very clearly under regulation and under procedure set forth by the Commander, Army Millitary Personnel Center, was a prohibited matter; even though Dougharty had several consecutive months of "Outstanding" evaluations; and, even though the board members unanimously recommended that his separation be remitted and that he be given a rehabilitative transfer. His commander ("Windle") would have had an impossible burden to set forth reasons and justify

those reasons in writing in order to pass judicial muster why Dougharty should be discharged. (3)

The rule of the Circuits at the time of this action by Windle requiring that reasons be set forth in processing a military member for discharge was clearly expressed in the seminal case of Matlovich v. Secretary of the Air Force & Thogerson, 591 F.2d 852 (USCA DC 1978). The Matlovich rule was argued both in Dougharty's opening brief as well as orally to the CAFC. (App. E) The CAFC

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(3) The Court of Federal Claims and its predecessor courts follow an impermissible and unpublished doctrine, likened to the equitable "clean hands" doctrine, not authorized by statute or otherwise expressed as such in assessing whether a claimant should have judgment. Thus, regardless of a prejudicial breach of a regulation by the military service in processing a member for discharge, any prior alleged wrongdoing by a member is determinative. The decision below, liberally construed for as to the Army and strictly construed against as to Dougharty, represents such a manner of decision.

refused to address this issue in its per curiam opinion, relying instead apparently on the dicta as expressed in the Claims Court case of Cohn v. United States, 15 Cl.Ct. 778 (1988) which requires reasons to be in writing for military correction boards (10 U.S.C. 152(a)) in discharge cases but not by military commanders in administrative processing for discharge.(See App. 26-28)

Matlovich was a sergeant on active duty in the U. S. Air Force and after twelve years of meritorious service, he wrote the Secretary of the Air Force announcing his homosexuality. An administrative board was convened and recommended discharge. His Commander, Thogerson, accepted the recommendation but expressed no reasons why Matlovich should be discharged or otherwise why certain provisions of regulation should not be waived. On review, the Secretary

of the Air Force approved Thogerson decisions, but expressed no reason in writing on either matter. After denial of Matlovich' request to overturn his discharge by the Board for Correction of Air Force records, the Secretary again declined to overturn the discharge, again expressing no reasons. The U. S. District Court granted the Air Force' motion for Summary Judgment.

The United States Court of Appeals for the District of Columbia reversed and remanded the decision stating first:

> The normal rule where discretionary administrative decision is to be reviewed by a court (other than on a de novo basis) is that the agency must give sufficient indication of the grounds for its exercise of discretion that the reviewing tribunal can appraise that determination under the appropriate standards of review (and the applicant for relief can challenge it) (Matlovich, supra, @ p. 857) (emphasis supplied)

The Court stated the judicial policy:

> This basic concept has been reiterated time and again--in differing formulations and contexts but always centering on the need for the court, and the complaining party, to be given some helpful insight in the agency's reasoning. (p. 857)

Thus, there presently exists a conflict among the Circuits as to whether a military commander must set forth his reasons in writing in processing a member for discharge from active duty as between Matlovich, which requires it, and Dougharty, which does not.

The rule of Matlovich finds further support from this Court in Secretary of the Navy v. Huff, 444 U.S. 453, 100 S.Ct. 606, 62 L.Ed.2d 607 (1980), wherein this stated in footnote 5: "Furthermore, the federal courts are open to assure that, in applying the regulations commanders do not abuse the discretion necessarily vested in them."

Under Army regulation AReg 635-200, Ch. 2, Sec. III, para. 2-6(1)(a)-(d) (App. C) Windle had four options. Under option (c), Windle could have disapproved the recommendation of the board as to discharge when "the file does not indicate that the soldier is without potential for full recovery." Obviously, by the time of his decision in June, 1991, Dougharty had six consecutive months of "Outstanding" evaluations. Windle does not state why Dougharty is without potential for full recovery. AReg 635-200, chapter 1, Section II, para. 1-18 (App. B-2) provides "..that the soldier was afforded a reasonable opportunity to overcome the deficiencies." Did Windle even consider this regulation? There is no indication in the record that he did.

The administrative board unanimously recommended that "(Dougharty's)

separation be suspended until 9 November 1991 at which time, unless the suspension is sooner vacated, the approved separation will be remitted." (JA 123) Under para. 206(d), Windle could have "suspend(ed) execution of the separation when the soldier's record shows sufficient potential for full effective duty." For the reasons expressed above Dougharty had shown a great deal more than potential; he was doing full effective duty. Windle did not express reasons why he did not suspend execution of the separation. Did he even read the regulation? There is no indication in the record that he did.

The administrative board recommended also that Dougharty be provided a rehabilitative transfer. (JA 123) Windle did not state in writing why he did not follow this recommendation or why he waived the rehabilitation requirements

expressed in para. 1-18d. The convoluted and inconsistent reasoning of this regulation is another issue (e.g., providing for a mandatory rehabilitative transfer "prior to separation action" (subpara. (c)) (emphasis supplied) while at the same providing, with the separation action having been convened without the required rehabilitation, that this can be waived after the separation authority receives the recommendation of the board. (Subpara. (d)) (4)

The fact that Windle overruled a unanimous administrative board is on its face an of abuse of discretion calling for the rule of Matlovich in companion with Huff to be the rule of this Court.

Dougharty did exactly what he was supposed to do and did exactly what was and is contemplated by the regulation.

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(4) The Court of Federal Claims referred to this analysis as "tortured". Why?

Windle was very obviously looking for reasons to "down-size" and in spite of the record in this case proceeded to discharge Dougharty. The actions of Windle are arbitrary, capricious, an abuse of discretion, and contrary to law and regulation. Sanders v. United States, 594 F.2d 804 (Ct.Cl. 1979). This Court's assumption of jurisdiction in military discharge cases is both settled and far-reaching, including the standards Dougharty sets forth herein. Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958).

That both courts below failed to require the regulation to be followed and to require a military commander to set forth the reasons for this action in writing is contrary to Matlovich and common sense. Their respective decisions are not only inequitable but, indeed, unconscionable.

2. The Courts below should have found that the Army breached its own regulation and published procedure in admitting the counseling forms after a lateral transfer between units and should have set aside Dougharty's discharge.

There is no question that counseling forms (DA Form 4856 set forth in App. D) prior to Dougharty's lateral transfer (the factual characterization of the transfer as found by the Court below @ A-6) were placed in evidence before Dougharty's administrative board. (JA 27-51 & 57). That these forms were prejudicial to Dougharty is uncontrovertible as established in the Findings portion of the administrative board, which included counseling forms as to his one felony conviction and the two arrests which were dismissed. (JA 123)

The forms prior to October 2, 1990, were to be destroyed after this reassignment based on the plain meaning

of the instructions at the bottom of the forms. AReg 635-200, chap. 1, Section II, para. 1-18(b)(3) (App. B-2), refers to this Form 4856 by number. The Form DA 4856 refers to AReg 635-200 in the heading of the form. (App D) This Form 4856 is and was authorized by the Commander, Military Personnel Center ("MILPERCEN").

This Form is, thus, at a minimum policy and without question published procedure. The military service active duty commander is required to follow regulation and published procedure, and violation of either gives rise to the basis for judicial review. Wyatt v. United States, 23 Cl.Ct. 314, 319 (1991); Sanders v. United States, 594 F.2d 804 (Ct.Cl. 1979).

That there is a violation of regulation and published procedure here in the processing of Dougharty is plain.

Yet, the Courts below failed to give recognition to this violation, and the Court of Federal Claims stated: "The court was not provided with any information which indicates that the statement on the forms was mandated by Army regulation, rule or policy." (App. A-32) This requirement is plainly in the regulation and on the form itself and despite argument to the CAFC, the CAFC refused to rule on this issue. The Court of Federal Claims "reached" to avoid the required result in this case by stating that the AReg 635-200 allows the administrative board to consider the "soldier's entire record". What the Court does not do is to consider what is meant by the "soldier's entire record". The "entire record" is plainly limited by published procedure in that those counseling forms prior to reassignment are to be destroyed.

The CAFC in its per curiam decision herein gives assent to this upholding of a clear violation of regulation and published procedure.

Thus, the courts below have so far departed from the accepted and usual course of judicial proceedings, as is the case with the Court of Federal Claims, and sanctioned such a departure by a lower court, as is the case with the CAFC, as to call for an exercise of this Court's power of supervision. U. S. Supreme Court Rules, Rule 10(a).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent.It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5096

GARY L. DOUGHARTY,
Plaintiff-Appellant

v.

THE UNITED STATES,
Defendant-Appellee

ON APPEAL from the United States Court of Federal Claims

in case NO(s). 92-142C

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

PER CURIAM (ARCHER, MICHEL and SCHALL, Circuit Judges):

AFFIRMED. Fed. Cir. R. 36.

DATED:Nov.9, 1993 /s/
Francis X. Gindhart.
Clerk

UNITED STATES COURT OF FEDERAL CLAIMS

GARY L. DOUGHARTY, Plaintiff)
)
v.)NO. 92-142C
)
THE UNITED STATES, Defendant)
)
)

ORDER

MOODY R. TIDWELL, Judge

This case is before the court on the parties' cross-motions for summary judgment. Plaintiff sought reinstatement in the Army and back pay for the period for which he was allegedly unlawfully discharged. Plaintiff argued that defendant's decision to terminate his service was arbitrary, capricious, contrary to law or regulation, or unsupported by substantial evidence.

I. FACTS

Plaintiff, former Staff Sergeant Gary L. Dougharty, entered the United States Army on November 13, 1975, and re-

enlisted on November 13, 1987, serving continuously on active duty. On February 8, 1988, the Army assigned plaintiff to the 423rd Medical Company at Fort Lewis, Washington.

On June 27, 1988, plaintiff was involved in a verbal altercation in a convenience store and arrested for criminal trespass. Charges were not filed against plaintiff as a result of this arrest. Shortly thereafter, on July 12, 1988, Guadelupe Gutierrez, plaintiff's platoon sergeant, noted, in a memorandum of record, plaintiff's failure to follow instructions and "a total lack of motivation or dependability"

In 1989, plaintiff began experiencing domestic problems with his then wife, Cheryl. On February 3, 1989, the police arrested plaintiff for allegedly striking and choking his wife,

and for resisting arrest. At trial, plaintiff's wife testified that she had fabricated the assault and the judge dropped both charges against Plaintiff. On January 15, 1990, plaintiff held a gun to his wife's head and threatened to kill her. The police arrested plaintiff and charged him with with second degree assault. Plaintiff pled guilty to third degree assault, a felony, on March 11, 1990, and served 15 days in jail. On March 15, 1990, Captain Rodney F. McBride notified plaintiff of his intent to initiate administrative discharge actions against him for personality disorder. Captain McBride counseled (1) plaintiff about his behavior and decided

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1. Counseling refers to a supervisor's evaluation of a subordinate's performance. The counseling may be either formal or informal, either written or verbal and either positive or negative.

to halt the discharge action against plaintiff. Captain McBride then rehabilitatively reassigned plaintiff to another platoon.

Plaintiff and his wife divorced in July 1990. Counseling sessions on July 30, 1990, addressed, inter alia, plaintiff's poor uniform appearance, his failure to inform commanders about changes in the platoon schedule, and his absence from an organized function. In order to allow plaintiff an opportunity to improve his performance, First Sergeant William E. Meeks relieved plaintiff as that platoon's sergeant, and rehabilitatively reassigned plaintiff to another platoon on July 30, 1990.

On September 4, 1990, as a result of further unsatisfactory behavior, Captain McBride requested a rehabilitative transfer of plaintiff to

another unit outside his current group. However, in October, 1990, before a rehabilitative transfer was implemented, plaintiff requested and received a non-rehabilitative, lateral transfer to the Headquarter's Company, Second Battalion, First Infantry Regiment, at Fort Lewis, Washington to "obtain a fresh start."

After the non-rehabilitative, lateral transfer, Staff Sergeant Ramon Rodrigues, in a memorandum dated November 26, 1990, recorded plaintiff's ineffectiveness as a noncommissioned officer and plaintiff's insubordination to fellow noncommissioned officers. On December 4, 1990, during review of performance for the month of November, Second Lieutenant Benjamin Gonzalez, plaintiff's supervisor, counseled plaintiff on his poor performance. Lieutenant Gonzalez noted lack of training, lack of self motivation and

lack of leadership skills in plaintiff's performance. On January 7, 1991, Lieutenant Gonzalez again counseled plaintiff, noting his inability to lead his platoon and his misconduct in not following orders. During this review, Lieutenant Gonzalez warned plaintiff that if no progress was shown administrative action would be taken.

A third review of plaintiff by Lieutenant Gonzalez took place on January 14, 1991, in which he noted that plaintiff's unsatisfactory performance and misconduct remained unimproved in the three and one-half months since plaintiff's transfer. Lieutenant Gonzalez again warned plaintiff that if his performance did not improve, he would be administratively discharged. The following day, plaintiff approached Lieutenant Gonzalez and warned him to be careful before initiating adverse

actions against him. When Lieutenant Gonzalez asked him to be specific, plaintiff stated, "You will find out." On January 16, 1991, Lieutenant Gonzalez observed plaintiff going through Lieutenant Gonzalez's file on plaintiff without permission.

On January 28, 1991, Captain J. Sladen Bradley, company commander of plaintiff's new unit, indicated to plaintiff that his counseling records indicated no improvement in plaintiff's performance or behavior, and that he intended to initiate proceedings to effect his removal from the service. At this time, plaintiff was reassigned to work for Warrant Officer Thomas L. Rupe. Warrant Officer Rupe counseled plaintiff on Feb. (sic) 19, 1991, indicating that plaintiff's performance during the month of February was outstanding. From this point on, all

counseling reports on plaintiff were exemplary. However, On (sic) April 1, 1991, Captain Bradley notified plaintiff that he was initiating an action recommending plaintiff's separation from the Army with a general discharge under honorable conditions for misconduct, pursuant to the pertinent Army regulations. The following day, after being advised of his rights, plaintiff chose to counsult with counsel about the separation action. Plaintiff also elected consideration of his case by an administrative board, (sic) and requested an appearance before the administrative separation board.

On April 4, 1991, Captain Bradley recommended to the commander of the 2nd Battalion, 1st Infantry Regiment of Fort Lewis, Washington, that plaintiff be separated from the Army under AR 635-200, ch. 14, Sec. III, para. 14-12b

(1990), for a pattern of misconduct. Captain Bradley also requested a waiver of the rehabilitation requirements of AR 635-200, ch. 1, Sec. II, para. 1-18, because "further attempts at rehabilitation would not be in the best interests of the Army."

Plaintiff appeared before an administrative separation board on May 13, 1991. Captain Michael J. Frey of the United States Army Trial Defense Service represented plaintiff at hearing. Letters, counseling statements through January 1991, reports, and civil and military police records were admitted into the hearing record as documentary evidence without objection by plaintiff or his counsel. Two witnesses for the defendant testified that plaintiff exhibited poor supervisory and leadership skills and failed to follow orders. Plaintiff, on

the other hand, presented four witnesses who testified favorably about plaintiff's technical skills and recommended his retention. The board concluded that plaintiff engaged in misconduct by his involvement in at least two incidents with civil authorities, his poor duty performance in two distinct units over a period of less than three years, and his apparent lack of subordination to authority. The board recommended that: (1) plaintiff be separated from the Army for misconduct, characterizing his service as general under honorable conditions; (2) separation should be suspended under November 9, 1991; and (3) plaintiff receive a rehabilitative transfer to a new unit.

Colonel Joseph C. Windle, the separation authority, approved the board's finding, but rejected the

board's recommendations. On June 28, 1991, Colonel Windle waived the rehabilitation requirement in writing and directed plaintiff's commander to separate plaintiff from the Army immediately for a pattern of misconduct. Plaintiff was discharged from the Army on November 7, 1991. Plaintiff filed this suit on March 2, 1992 alleging this separation and discharge from the United States Army was contrary to the statutes, rules and regulations of the Army, and requested that the court reinstate him to active duty with full back pay and allowances.

II. DISCUSSION

Purusant to the Tucker Act, 28 U.S.C. 1491 (1988), the Court of Federal Claims has jurisdiction over claims for reinstatement in the Army and for back pay for the period of claimant's unlawful separation. Sargisson v.

United States, 913 F.2d 918, 920 (Fed.Cir.1990); Wyatt v. United States, 23 Cl.Ct. 314, 318 (1991).

Summary judgment is appropriate when there is "no genuine issue as to a material fact" so that the moving party "is entitled to judgment a a matter of law." RCFC 56(c). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 9 L.Ed.2d 202 (1986); Chevron U.S.A., Inc., v. United States, 17 Cl.Ct. 537, 540 (1989), rev'd on other grounds, 923 F.2d 830 (Fed.Cir.1991). In order to show that a material fact is genuinely at issue, the non-movant must do more than present "some" evidence on the disputed issue. Liberty Lobby 477 U.S. at 248-50, 106 S.Ct. at 2510-11. As the Supreme Court stated, "(T)here is no

issue for trial unless there is sufficient evidence favoring the non(-)moving party for a (court) to return a verdict for that party. If the evidence (of the non-movant) is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249-250, 106 S.Ct. at 2511 (citations omitted). "(When) the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsuchita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Plaintiff is bound by defendant's determination to separate plaintiff from the Army for a pattern of misconduct, unless he can establish by "cogent and convincing evidence" that the decision was arbitary, capricious, unsupported by substantial evidence or contrary to

law. Wronke v. Marsh, 787 F.2d 1569, 1576 (Fed.Cir.), cert. denied, 479 U.S.853, 107 S.Ct. 188, 93 L.Ed.2d 121 (1986); Heisig v. United States, 719 F.2d 1153, 1156 (Fed.Cir.1983); Sanders v. United States, 219 Ct.Cl. 285, 594 F.2d 804, 811 (1979); Dorl v. United States, 200 Ct.Cl. 626, 633, cert. denied, 414 U.S. 1032, 94 S.Ct. 461, 38 L.Ed.2d 323 (1973); Wyatt, 23 Cl.Ct. at 318-19. Plaintiff must establish the existence of error, and must also show "an adequate nexus between the error or injustice and (plaintiff's) separation from the service. . . ." Renicker v. United States, 17 Cl.Ct. 611, 614 (1989); see also Frecht v. United States, 25 C.Ct. 121, 127 (1992). Thus, in reviewing the decision, the court must presume "that administrators of the military...discharge their duties correctly, lawfully, and in good faith."

Sanders, 594 F.2d 813. Determining who is fit or unfit to serve in the armed forces is not a function of the judiciary. Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953); Giglio v. United States, 17 Cl.Ct. 160, 166 (1989). Although the court might disagree with the decision of the separating authority, it can not (sic) substitute its judgment for that of the separating authority when reasonable minds could reach differing conclusions. Heisig, 719 F.2d at 1156; Sanders, 594 F.2d 814; Frecht, 25 Cl.Ct. at 128.

Plaintiff contended that the army acted contrary to regulation by: (1) considering his felony conviction; (2) establishing discreditable conduct with civil authorities without criminal convictions; (3) not providing him with counseling and a reasonable opportunity

to overcome his deficiencies; (4) not following the Army's rehabilitation requirements; (5) not including his last two favorable counseling reports in the records before the separation board; and (6) including counseling reports from his previous unit in the record before the separation board.

A. Consideration of Plaintiff's Felony conviction was Proper

Plaintiff argued that the Army was prohibited from considering his felony conviction because it had already been the subject of an administrative proceeding. See AR 635-200, Ch.1, Sec. II, para. 1-19b. Army regulations provide that separation "normally should not be based on conduct which has already been considered at an administrative or judicial proceeding and disposed of in a manner indicating that separation was not warranted." Id.

Apparently plaintiff believed that Capt. McBride's decision to halt discharge proceedings for a personality disorder after plaintiff's felony conviction constituted an administrative proceeding. However, the regulation does not permit such an interpretation. The regulation states:

> No soldier will be considered for administrative separation because of conduct--
>
> (1) Has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof....
>
> (2) Has been the subject of a prior administrative board in which the board entered an approved finding that the evidence did not sustain the factual allegations concerning the conduct..,or
>
> (3) Has been the subject of an administrative separation proceeding resulting in a final determination by a separation authority that the soldier should be retained.....

Id.

Paragraph 1-19b is not applicable in this case, because plaintiff's conviction was not the subject of a prior administrative proceeding or an administrative separation proceeding resulting in a final determination by a separtion authority. Because Captain McBride was not a separation authority, his decision to halt the initiation of separation proceedings could not, even arguably, be considered a final determination as defined in AR 635-200, ch. 1, Sec II., para. 1-19b.

B. Criminal Convictions are not Required to Establish Discreditable Conduct

Plaintiff argued that the Army violated its regulations by considering two instances of discreditable conduct with civil authorities that did not result in criminal convictions. The separting authority processed plaintiff

for discharge for a pattern of misconduct under AR 635-200, ch. 14, Sec. III, para. 14-12b, which describes a pattern of conduct as " consisting of .....(d)iscreditable involvement with civil or military authorities." Relying on Quailes v. United States, 25 Cl.Ct. 659, 664 (1992), plaintiff asserted that discreditable conduct was defined as three or more minor convictions within the past year. The definition in Quailes, however, is not applicable because its definition of discreditable conduct came from the Navy Personnel Manual; not Army regulations. Army regulations define discreditable conduct as "conduct violative of the accepted standards of personal conduct found in the UCMJ (Uniform Code of Military Justice), Army regulations, the civil law, and time-honored customs and traditions of the Army." AR 635-200,

ch. 14, Sec. III, para. 14-12b(2). According to article 134 of the Uniform Code of Military Justice, discreditable conduct is conduct of which persons subject to the code may be guilty that tends to bring the service into disrepute or tends to prejudice. 10 U.S.C. 934 (1988). Any conduct resulting in injury to the reputation of the service or a threat to good order is discreditable conduct. See United States v. Sadler, 29 M.J. 370, 374 (C.M.A. 1990); United States v. Davis, 26 M.J. 445, 448 (C.M.A. 1988).

Because, under Army regulations, discreditable conduct is not limited to criminal convictions, the separating authority properly considered plaintiff's involvement with civilian authorities even though the incidents did not result in conviction. The separating authority determined that the

police reports in the record constituted proof of conduct that was injurious to the reputation of the service and threatened good order. Thus, the separating authority's conclusion was supported by evidence in the record and did not violate Army regulations.

C. Plaintiff Received the Required Counseling

Plaintiff argued that because his two counseling reports immediately proceeding the separation proceeding were exemplary, he was not adequately counseled and given a "reasonable opportunity to overcome (his) deficiencies" as required by AR 635-200, ch.1, Sec. II, para 1-18. (2) However,

---

(2) Army Regulation (AR) 635-200, ch. 1, Sec. II, para. 1-18 (1990), provides in part:

a. General. commanders will insure that adequate counseling and rehabilitative measures have been taken before initiating action to separate a

there is no support for plaintiff's tortured interpretation of the Army regulation in the administrative record.

The administrative record clearly demonstrates that plaintiff received counseling and an opportunity to cure his deficiencies, as required by paragraph 1-18, for more than a year

---

(footnote (2) continued)
soldier....

b. Counseling. When a soldier's conduct or performance approaches the point where a continuation of such conduct or performance would warrant initiation of separation action....he or she will be counseled by a responsible person about his or her deficiencies at least once before initiating separation action.

(1) Additional formal counseling is discretionary. Such factors as the length of time since the prior counseling, the soldier's conduct and performance during that period, and the commander's assessment of the soldier's potential for becoming a fully satisfactory soldier, should be considered in determining whether further counseling is necessary. The soldier's counseling or personnel records must establish that the soldier was afforded a reasonable opportunity to overcome the deficiencies.

prior to initiation of the discharge proceedings. In fact, appropriate authorities counseled plaintiff monthly on his unsatisfactory peformance for the first four months after plaintiff's transfer to his new unit to "obtain a fresh start." Additionally, Lieutenant Gonzalez warned plaintiff on at least two occasions during that four month period that he would be discharged if his performance did not improve. This alone was sufficient under the paragraph 1-18b requirement of a "reasonable opportunity to overcome deficiencies." Paragraph 1-18b requires only one counseling prior to the initiation of a separation proceeding. See AR 635-200, ch. 1, Sec. II, para. 1-18b. The fact that plaintiff changed his behavior after Captain Bradley informed him that he intended to initiate an elimination proceeding does not negate all previous

attempts to counsel plaintiff.

D. Rehabilitation Requirements were Met

Plaintiff argued that the separation authority violated Army regulation by initiating administrative processing without first following the rehabilitative requirements of AR 635-200, ch. 1, Sec. II, para. 1-18c. Paragraph 1-18c requires that prior to the initiation of a separation action for a pattern of misconduct, a soldier must be reassigned at least between training companies or platoons, or transferred to another station permanently. AR 635-200, ch. 1, Sec. II, para. 1-18c. However, the requirement of a rehabilitative transfer may be waived. Pargraph 18d provides:

> The requirement of rehabilitative transfer may be waived by a separation authority at any time on or before the date the separation authority approves or disapproves the separation.

> Waiver authority may be withheld by a higher separation authority in a particular case, class of cases, or all cases. Action to withhold waiver authority will be in writing and will be valid until revoked in writing. Waiver must be based upon the determination of the separation authority that further duty of the soldier would----
>
> (1) Create serious disciplinary problems or a hazard to the military mission or to the soldier, or
>
> (2) Be inappropriate because the soldier is resisting rehabilitation attempts, or
>
> (3) Rehabilitation would not be in the best interests of the Army as it would not produce a quality soldier.

Ar 635-200, ch. 1, Sec. II., para. 18d.

Pursuant to paragraph 1-18d, Colonel Windle, the separation authority, specifically waived the rehabilitation requirement of AR 635-200, ch. 1, Sec. II, para. 1-18c in writing. Plaintiff argued that the waiver was not valid under paragraph

1-18d, because the waiver did not state in writing the reasons upon which it was based. Plaintiff's argument has no merit. Paragraph 1-18d, (sic) does not suggest or imply that the reasons for waiving rehaiblitation must be stated in writing. The regulation only requires that an action by a high separation authority to withhold waiver authority must be in writing. This was not the case here. Athough plaintiff cites Cohn v. United States, 15 Cl.Ct. 778 (1988), to support his position, Cohn does not stand for the proposition plaintiff states. In Cohn, the court stated that a commander's failure to state his reasons for denying probation and rehabilitation does not tarnish a discharge proceeding. 15 Cl.Ct. at 795. An explanation of the separating authority's determination may be prudent, but paragraph 1-18d simply does

not require that the determination upon which the waiver is based be in writing.

Even assuming, arguendo, that the waiver by Colonel Windle was not valid, the requirement for rehabilitative transfer was met. According to the administrative record, plaintiff's commander transferred plaintiff for rehabilitation to other platoons on March 16 and July 30, 1990. These transfers alone fulfill the requirements of rehabilitation under paragraph 1-18c. Further, plaintiff's lateral transfer in October of 1990 would meet the requirement of paragraph 1-18c. The regulation merely requires that a soldier will be reassigned---there is no requirement that the reassignment be labeled a rehabilitative transfer. It is clear from the record that plaintiff had opportunities to rehabilitate himself through transfers, meeting both

the spirit and letter of paragraph 1-18c. The fact that plaintiff appeared willing to rehabilitate himself after Captain Bradley initiated elimination proceedings does not negate the Army's previous attempts to rehabiltatively transfer plaintiff.

E. Failure to Admit Favorable Counseling Statements into the Record was not Improper

Plaintiff contended that his last two favorable counseling reports from Warrant Officer Rupe prior to the initiation of separation proceedings were improperly omitted from the administrative record and that without this evidence the record was incomplete. However, "evidence and argument not presented to the ... board may not now be considered (by the court), absent a showing that the evidence was unavailable below." Alligood v. United States, 14 Cl.Ct. 11,

20 (1987); accord Wyatt v. United States, 23 Cl.Ct. 314, 319 (1991). The record indicates that plaintiff failed to admit the favorable counseling reports into the record as evidence even though they were available at the time. Because plaintiff failed to show that the counseling reports were unavailable at the hearing, the court's analysis must be based solely on the administrative record presently before the separating authority.

Further, plaintiff's failure to introduce the favorable reports into the record did not prejudice plaintiff because Warrant Officer Rupe testified at the hearing and submitted a written statement of plaintiff's performance to the board, thereby entering his favorable evaluation of plaintiff into the record. In addition, three other witnesses testified favorably before the

board of plaintiff's conduct and recommended plaintiff's retention by the Army. As a result, plaintiff may not be heard to validly claim that the record was incomplete or that his failure to admit the counseling reports harmed him.

F. Consideration of Counseling Forms was not Violative of Army Regulations

Plaintiff argued that the Army violated its regulations by considering counseling forms dated prior to his non-rehabilitative reassignment in October, 1990. At the bottom of the general counseling form (DA Form 4856) is the statement that the form "will be destroyed upon ... reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement." Based on the wording of the forms dating back before his non-rehabilitative, lateral reassignment in October 1990 were to be destroyed. Plaintiff argued

that because these counseling forms were not destroyed and were instead included in the administrative record, and because the board and the separation authority considered these forms when making their decisions to discharge plaintiff, the counseling forms tainted the discharge proceeding.

However, the disposition instructions on the form directly contradict Army regulations. AR 635-200, Ch. 1, Sec. II, para. 1-17d provides that a separation authority may consider a soldier's entire military record in deciding whether to retain or separate a soldier, including counseling records. The court was not provided with any information which indicates that the statement on the forms was mandated by Army regulation, rule or policy. Accordingly, based upon a clear reading of AR 635-200, Ch. 1, Sec. II,

para. 1-17d, the court concludes that the separating authority did not err in considering plaintiff's counseling forms dated prior to his non-rehabilitative reassignment in October 1990.

III. CONCLUSION

For the reasons stated above, the court denies plaintiff's cross-motion for summary judgment and grants defendant's motion for summary judgment. In so doing the court finds that there was sufficient evidence in the record to conclude that the decision to terminate plaintiff's service was not arbritrary, captricious, contrary to law or regulation, or unsupported by substantial evidence. Accordingly, plaintiff's complaint is dismissed. Costs.

IT IS SO ORDERED.

Dated: January 8, 1993 /s/_____
Moody R. Tidwell
Judge

A-35

UNITED STATES COURT OF FEDERAL CLAIMS

NO. 92-142C

GARY L. DOUGHARTY, Plaintiff	)	
	)	
v.	)	JUDGMENT
	)	
THE UNITED STATES, Defendant	)	
	)	
	)	

Pursuant to the court's order of January 8, 1993, denying plaintiff's cross-motion for summary judgment, and granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the comlaint is dismissed. Costs to defendant.

David A. Lampen
Clerk of Court

January 12, 1993

By: /s/
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

APPENDIX B

Complete Text of Paragraph 1-18 of Army Regulation (AR) 635-200:

1-18 Counseling and rehabilitative requirements

a. General. Commanders will insure that adequate counseling and rehabilitative measures have been taken before initiating action to separate a soldier for one of the following reasons. Reassignments made in rehabilitation attempts normally will not use permanent change of station of military Army (PCS-MPA), funds (see para c(3) below for exceptions).

(1) Involuntary separation due to parenthood (para 5-8).

(2) Personality disorder (para 5-13).

(3) Entry level performance and conduct (Chap 11).

(4) Unsatisfactory performance (chap 13).

(5) Minor disciplinary infractions or a pattern of misconduct (para 14-12a and b).

b. Counseling. When a soldier's conduct or performance approaches the point where a continuation of such conduct or performance would warrant initiation of separation action for one of the reasons in a above, he or she will be counseled by a responsible person about his or her deficiencies at least once before initiating separation action.

(1) Additional formal counseling is discretionary. Such factors as the length of time since the prior counseling, the soldier's conduct and performance during that period, and the commander's assessment of the soldier's potential for becoming a fully

satisfactory soldier, should be considered in determining whether further counseling is necessary. The soldier's counseling or personnel records must establish that the soldier was afforded a reasonable opportunity to overcome the deficiencies.

(2) This counseling will be conducted per AR 350-21, paragraph 5. It will be comprehensive and will include at least the following:

(a) Reason for counseling.

(b) That separation action may be initiated if the behavior continues.

(c) The type of discharge that could result from the possible separation action and the effect of each type.

(3) Each counseling session required by this paragraph must be recorded in writing. DA Form 4856 (General Counseling Form) normally should be used for this purpose.

c. Rehabilitation. At least one of the following measures will be taken prior to initiation of separation action for one of the reasons established in a(3) through (5) above:

(1) Replacement stream personnel. Soldiers will be recycled (reassigned between training companies or, where this is not feasible, between training platoons) at least once.

(2) Other than replacement stream personnel. Soldiers will be reassigned at least once, with at least 2 months of duty in each unit. Reassignment should be between at least battalion-size units. This requirement does not prevent reassignment between brigade or larger units when considered necessary by local commanders. If this is not

possible because of the circumstances involved in a case, the procedures prescribed in (3) below will apply.

(3) Permanent change of station transfer. A permanent change of station may be considered necessary to provide a change in commanders, associates, and living or working conditions to rehabilitate a soldier. If so, the commander exercising general court-martial jurisdiction over the soldier may authorize such reassignment within the same command (or may request HQDA(TAPC-EP-appropriate branch), Alex VA 22331, to accomplish assignment to another command) provided--

(a) the soldier involved is in pay grade E-4 (with 2 years of service or less), corporal or specialist, PFC, or PVT. Soldiers in grade E-4 of corporal or specialists with over 2 years of active service and all other personnel who are eligible because of grade and service for transportation of dependents and shipment of household goods are not eligible for reassignment per this paragraph.

(b) A transfer to anther station would not be detrimental to the soldier or to the Army. (This includes cases involving indebtedness, soldiers enrolled in ADAPCP, soldiers undergoing special counseling or other rehabilitative type mental health treatment programs, or maladjusted or apathetic soldiers who could not be expected to respond to disciplinary controls or benefit from change of associates, regardless of assignment locale.)

d. Waivers. The requirement for a rehabilitative transfer may be waived by the separation authority at any time on

or before the date the separation authority approves or disapproves the separation. Waiver authority may be withheld by a higher separation authority in a particular case, class of cases, or all cases. Action to withhold waiver authority will be in writing and will be valid until revoked in writing. Waiver must be based upon the determination of the separation authority that further duty of the soldier would--

(1) Create serious disciplinary problems or a hazard to the military mission or to the soldier, or

(2) Be inappropriate because the soldier is resisting rehabilitation attempts, or

(3) Rehabilitation would not be in the best interests of the Army as it would not produce a quality soldier.

APPENDIX C

PARTIAL TEXT OF PARA. 2-6 of AR 635-200, containing 2-6a(1)(a)-(d):

2-6. **Separation authority action after board hearings**

a. When a case has been referred to and action completed by the board, the board of proceedings will be reviewed by a qualified officer fully cognizant of applicable regulations and policies to determine whether the action meets the requirements of this regulation. When the board recommends that a discharge under other than honorable conditions be issued, limited use evidence (para 3-8g) was introduced in the board proceedings, or the soldier identifies specific legal issues for consideration by the separation authority, the proceedings will be reviewed by an officer of the Judge Advocate General's Corps. Upon completion of the review--

(1) When the board has recommended separation for misconduct, the separation authority may take one of the following actions:

(a) Direct separation of the soldier for misconduct except for soldiers referred to in paragraph 1-21f. (See also para 2-12b(5).)

(b) Direct separation of the soldier for unsatisfactory performance if such was the stated provision in the initial letter of notification, except for soldiers referred to in paragraph 1-21f. (See also para 2-12b(5).)

(c) Disapprove the recommendation. Direct retention of the soldier when the grounds for separation are not documented in the file or if the file does not indicate that the soldier is without potential for full effective duty and separation is not otherwise

mandatory.

(d) Unless specifically prohibited, approve separation for misconduct and suspend execution of the separation when the soldier's record shows sufficient potential for full effective duty. (See para 1-20.)

APPENDIX D

Published Procedure of the Army as set forth in the wording of DA Form 4956 (General Counseling Form) as set forth in pertinent part below:

GENERAL COUNSELING FORM

For use of this form see AR 635-200; the proponent agency is MILPERCEN

DATA REQUIRED BY THE PRIVACY ACT OF 1974

Authority: 5 USC 301, 10 USC 3012(G).
PRINCIPAL PURPOSE: To record counseling date pertaining to service members.
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

PART I-BASIC DATA

(herein follows 6 blocks of data)

PART II-OBSERVATIONS

(herein follows 2 blocks for the observations)

DISPOSITION INSTRUCTIONS

This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement._

DA FORM 4856, JUN 85 Edition of Jul 84 is obsolete

APPENDIX E

Excerpts of Plaintiff-Appellant's Opening "Brief of Appellant" before the Court of Appeals for the Federal Circuit citing to Matlovich, pp. 27-34 inclusive:

4. Is the Separation Authority Required To Set Forth Reasons For Its Decision In Overruling the Decision and Recommendation of Dougharty's Administrative Board?

This Court, as well as the Court below, have been asked by the Army to affirm the decision of Col. Windle. The decision of Col. Windle is found in JA 18. The decision is entirely conclusionary without reasons set forth for his action and in two instances entirely contrary to the recommended by a unanimous board.

Insofar as research discloses, this Court has never been asked to require a military commander to set forth his or her reasons in writing for an adverse decision to a military member in a military personnel action, as the near unanimous (if not in fact) number of Courts now require in other kinds of administrative actions.

The Court of Federal Claims below is inconsistent in this salutory review requirement. That Court requires boards for correction of military records to express reasons for its decisions; yet, apparently that Court does not require the same of a military commander in adverse military personnel actions. Cohn v. U. S., 15 Cl.Ct. 778 (1988).

It is now time for this Court to require said reasons to be set forth in both circumstances and to instruct the Court below. The Court below refused to

require reasons as to military commanders, following the dicta in Cohn, supra.

The seminal case, decided by what might be referred to as the "sister (or brother) court" to this Court, requiring military commanders to express reasons in writing for military personnel decisions is Matlovich v. Secretary of the Air Force & Thogersen, 591 F.2d 852 (USCA DC 1978). Thogerson was Matlovich's commanding officer.

After twelve years of highly meritorious service as a sergeant in the U. S. Air Force, Matlovich wrote the Secretary of the Air Force and announced his homosexuality. After investigation, an administrative board was convened, and said board recommended that he be discharged. Thogersen accepted the board's recommendation but upgraded the same to honorable. This decision was approved twice by the Secretary of the Air Force, once on a decision on direct review of Thogerson's decision and a second time after review by the Board for Correction of Air Force Records. No reasons were expressed by any of these parties for failure to waive certain provisions, as provided for in the Air Force regulation. The District Court granted the government's motion for summary judgment.

The Court of Appeals vacated the decision and remanded the matter, following the general rule:

> The normal rule where discretionary administrative decision is to be reviewed by a court (other than on a de novo basis) is that the agency must give sufficient indication of the grounds for

> its exercise of discretion that the reviewing tribunal can appraise that determination under the appropriate standards of review (and the applicant for relief can challenge it). (p. 857) (emphasis supplied)

The Court states the judicial policy:

> This basic concept has been reiterated time and again--in differing formulations and contexts but always centering on the need for the court, and the complaining party, to be given some helpful insight in the agency's reasoning. (p. 857)

Except for the first recommendation of the administrative board, Col. Windle did not follow the recommendations of the administrative board. The above rule is salutory in each of the three instances.

The administrative board first recommended that Dougharty be separated from the Army for misconduct. (JA 123) Referring to AReg 635-200, para. 2-6(a)(1) as the authority when a board recommends separation, Col. Windle had four options (a)-(d).

Under option (c) Col. Windle could have disapproved said recommendation when "the file does not indicate that the soldier is without potential for full recovery." Windle does not say why he did not follow this provision. This is especially important to Doughary, since by 28 June when Col. Windle made

his decision of record, Dougharty had by this time six consecutive months of "Outstanding" evaluations. How can Col. Windle fail to consider these evaluations; or, worse, if he did consider them, how could he arrive at the conclusion that Dougharty was without "potential for full recovery"? (emphasis supplied)

The second decision by the board was that "the separation be suspended until 9 November 1991 at which, time, unless the suspension is sooner vacated, the approved separation will be remitted". (JA 123) Under option (d) Col. Windle could have "suspend(ed) execution of the separation when the soldier's record shows sufficient potential for full effective duty." For the reasons expressed in the preceding paragraph, Dougharty by 28 June 1991 had shown more than sufficient potential for rehabilitation. Windle does not say why he did not follow this recommendation. The above rule of Matlovich has particular application for this second recommendation of the board. By all that's rational this recommendation should have been followed, since the board had before it all materials adverse to Dougharty (even though the board should not have had much of this material).

Dougharty's case involves to a significant degree his positive rehaibilitation efforts from January 1991 on until his discharge. The Court below shows disdain for these efforts by stating:

> "The fact that plaintiff appeared willing to rehabilitate himself after Captain Bradley initiated

> elimination proceedings does not negate the Army's previous attempts to rehabilitatively transfer plaintiff." (JA 11)

The simple counter to this reasoning is that what Dougharty did was exactly what was contemplated by or required by regulation in establishing rehabilitative measures. In short and quite obviously, the policy is provide the soldier with a last chance. Dougharty did just this, and the comment of the Court below is entirely unfair either under the letter or spirit of the regulation or to Dougharty's efforts.

Thus, what this case deals with in or to a significant measure is with the "waiver" provisions of 1-18(c). Col. Windle had three choices in the face of request to waive the rehabilitation requirements:

> Action to withhold waiver authority will be in writing and will be valid until revoked in writing. Waiver must be based upon the determination of the separation authority that further duty of the soldier would---
> (1) Create serious disciplinary problems or a hazard to the military mission or to the soldier, or
> (2) Be inappropriate because the soldier is resisting rehabilitation attempts, or
> (3) Rehabilitation would not be in the best interests of the Army as it would not produce a quality soldier. (AReg 635-200, 1-18d)

Does not this provision implicitly require a military commander to set forth his reasons for waiving rehabilitation when the wording "must be in writing" and "based upon a determination" are employed? How is this Court going to evaluate and review the Commander's action with merely a bare conclusion expressed? (6) (footnote (6) is omitted in this Appendix to this Application for Writ of Certiorari as the substance of the footnote is stated elsewhere)

Does not the rule of Matlovich, and certainly the reason for the rule, require that the reasons be in writing in order to review possible or probable arbitary and capricious actions? And, it is not an insignificant inquiry to ask whether Col. Windle, in this instance, even knew about or reviewed this provision? How is a reviewing court to know, except maybe through a bare presumption?

The Court below is plainly wrong in is expressed reasons at JA 11 eschewing Dougharty's claims about the need for a rehabilitative transfer because he had "opportunities to rehabilitate himself through transfers, meeting both the spirit and letter of paragraph 1-18c". Dougharty plainly only had one "transfer" and that was lateral. His internal assignments/reassignments did not meet the "letter" of the regulation, since Dougharty never before had a rehabilitative transfer, as that term is understood and employed in Areg 635-200. As to the "spirit" of the regulation, the "spirit" of the regulation is to encourage and foster transfers even after notice of impending adminsitrative separation. Even this was unecessary since Dougharty had met the "spirit" of

the regulation in that he had become rehabilitated in the January to August 1991 time frame by or under whatever definition of that word without a formal rehabilitative transfer (even so, he should have been afforded that rehaiblitative transfer to continue his positive progress). The Court below is employing specious reasoning--"reaching", if you will--to achieve the result in this case. Dougharty sincerely asks this Court to overturn this result based on faulty reasoning.

On its face, the decision of Col. Windle fails to meet fundamental due process of law as expressed in Matlovich. The circuits should remain steadfast and consistent in this requirement.

Dougharty asks this Court to reverse the Court below and to hold that Dougharty's Motion for Summary Judgment should have been granted on the ground that the military commander should have set forth his reasons in writing for his decision to discharge Dougharty. Dougharty asks this Court for an Order to void his discharge and reinstate him to active duty with full back pay and allowances.

Supreme Court, U.S.
FILED
MAY - 3 1994
OFFICE OF THE CLERK

No. 93-1265

In the Supreme Court of the United States

OCTOBER TERM, 1993

GARY L. DOUGHARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the United States Army acted arbitrarily, capriciously, or contrary to law in discharging petitioner from service on the ground that he engaged in a pattern of misconduct.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1) is unpublished, but the judgment is noted at 11 F.3d 1073 (Table). The opinion of the Court of Federal Claims (Pet. App. A2-A35) is reported at 27 Fed. Cl. 436 (1993).

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1993. The petition for a writ of certiorari was filed on February 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner joined the United States Army in 1975 and re-enlisted in 1987, serving continuously on active duty. Pet. App. A2-A3. In 1988, civilian police officers arrested petitioner for criminal trespass following a verbal altercation in a convenience store. *Id.* at A3. Shortly thereafter, petitioner's platoon sergeant noted in a memorandum that petitioner did not follow instructions and exhibited a "total lack of motivation or dependability." *Ibid.*

In 1989, civilian police officers arrested petitioner for assault on his then wife and for resisting arrest. Pet. App. A3-A4. Those charges were dropped at trial when petitioner's wife recanted her charges. *Id.* at A4. In January, 1990, petitioner held a gun to his wife's head and threatened to kill her. *Ibid.* Petitioner subsequently pleaded guilty in civilian court to felony assault and served 15 days in jail. *Ibid.* Several months later, Captain Rodney F. McBride notified petitioner of his intent to initiate administrative proceedings to discharge him from the Army. *Ibid.* Captain McBride subsequently halted the processing of the separation proceedings, however, and instead placed petitioner on rehabilitative reassignment to another platoon. *Id.* at A4-A5.

Shortly after arriving at his new platoon, petitioner was relieved of duty as platoon sergeant and counseled for poor uniform appearance, failure to inform commanders about changes in platoon schedules, and absence from an organized function. Pet. App. A5. The platoon's First Sergeant gave petitioner a rehabilitative assignment with yet another platoon. *Ibid.* Army officials recommended another rehabil-

itative transfer in September, 1990, as a result of further unsatisfactory behavior. *Id.* at A5-A6. Before that rehabilitative transfer occurred, however, petitioner requested and received a non-rehabilitative, lateral transfer. *Id.* at A6.

Two months after petitioner's lateral transfer, his staff sergeant reported that petitioner was ineffective as a noncommissioned officer and insubordinate to fellow noncommissioned officers. Pet. App. A6. Petitioner's supervisor counseled him numerous times concerning petitioner's poor performance, noting that petitioner lacked training, self-motivation, and leadership skills. *Id.* at A6-A7. The supervisor warned petitioner on two occasions that he would be discharged if his conduct did not improve. *Id.* at A7.

In January, 1991, Captain J. Sladen Bradley (petitioner's company commander) notified petitioner of his intention to initiate administrative separation proceedings to discharge petitioner, because petitioner's records indicated no improvement in his performance or behavior. Pet. App. A8-A9. Captain Bradley initiated the process in April, 1991. *Id.* at A9-A10. Captain Bradley also recommended to the official charged with decision-making authority that an Army regulation requiring a rehabilitative transfer be waived on the ground that "further attempts at rehabilitation would not be in the best interests of the Army." *Id.* at A10.

2. Petitioner appeared before an administrative separation board in May, 1991. Pet. App. A10. Letters and written counseling statements documenting petitioner's poor performance and misconduct, as well as civil and military police records, were admitted

into the hearing record without objection by petitioner. *Ibid.* Two witnesses testified about petitioner's poor leadership and supervisory skills, and about his failure to follow orders. *Ibid.* Petitioner presented four witnesses who praised his technical skills and recommended his retention in the Army. *Id.* at A11.

The board found that petitioner had engaged in misconduct by his involvement in at least two incidents with civil authorities, his poor duty performance in two different units over a period of less than three years, and his apparent lack of subordination to authority. Pet. App. A11. The board recommended that petitioner be separated from the Army, but also that the separation be suspended for six months and that petitioner receive a rehabilitative transfer to a new unit. *Ibid.* Colonel Joseph C. Windle, the separation authority, approved the board's findings. He rejected, however, the recommendations for suspension of the discharge and for a rehabilitative transfer. *Id.* at A11-A12. Colonel Windle accordingly waived the rehabilitative transfer requirement in writing and directed that petitioner be discharged immediately. *Id.* at A12.

3. Petitioner thereafter brought this action in the Court of Federal Claims, alleging that his discharge was unlawful and seeking reinstatement and back pay. Pet. App. A2. The court granted summary judgment for the Army. *Id.* at A33. It first held that the Army acted properly in considering petitioner's felony conviction in the discharge proceedings, and also that it was not improper for the Army to consider incidents of misconduct that did not result in criminal convictions. *Id.* at A17-A22. The court next rejected

petitioner's argument that he was not given a sufficient opportunity to benefit from counseling and to cure his deficiencies, noting that petitioner received counseling and rehabilitative opportunities for more than a year. *Id.* at A22-A24.

The court also rejected petitioner's argument that the Army violated the rehabilitative transfer requirement. The court found that the written waiver of a rehabilitative transfer fully complied with the regulation, and that, even if the waiver were not valid, the lateral transfer that petitioner received in October, 1990, met the rehabilitative transfer requirement. Pet. App. A27-A28. Finally, the court rejected petitioner's argument that his counseling records should not have been considered in the discharge proceedings, noting that Army regulations expressly provide for consideration of these records. *Id.* at A31-A32.

4. The court of appeals affirmed without opinion. Pet. App. A1.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. a. Petitioner first argues (Pet. 11-21) that the Army's decision is arbitrary and capricious because military officials did not provide a sufficient statement of reasons for the decision. Petitioner, however, was fully aware of the reasons for the action against him. Army officials notified petitioner of his unacceptable conduct, repeatedly warned petitioner that he would be discharged if his conduct did not improve,

and further notified him that the separation proceedings were based upon a "pattern of misconduct." See Pet. App. A4-A10. Moreover, the administrative board's findings explicitly set out the nature of petitioner's pattern of misconduct: his discreditable involvement in at least two incidents with civil authorities, his poor duty performance in two different units over a period of less than three years, and his apparent lack of subordination to authority. *Id.* at A11.

b. Petitioner's contention (Pet. 19-20) that the separation authority did not provide sufficient reasons for waiving the rehabilitation requirement likewise is without merit. While an agency must articulate a rational connection between the facts and the decision it makes, see *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974), the agency decision "need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). Courts must uphold even "a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp.*, 419 U.S. at 286.

The Army's basis for waiving the option of a rehabilitative transfer is readily discernable from the record. Petitioner's pattern of misconduct was well documented, and he had previously been given a lateral transfer in 1990 to a new company, with new supervisors, in order to obtain a fresh start. Before that transfer, petitioner had twice been transferred between platoons within the same company. In light of petitioner's extensive record of improper activities and poor performance, as well as previous unsuccessful attempts to rehabilitate him, Captain Bradley

recommended waiver of the rehabilitative transfer requirement because he felt that "*further* attempts at rehabilitation would not be in the best interests of the Army," as they would not produce a quality soldier. Pet. App. A10 (emphasis added).

Colonel Windle, the separation authority, had before him petitioner's extensive record of misconduct and of prior rehabilitative attempts. He also had before him two competing recommendations: Captain Bradley's recommendation against rehabilitation on the ground that further rehabilitative efforts would be fruitless, and the administrative board's recommendation that petitioner receive a rehabilitative transfer. Colonel Windle's decision to choose Captain Bradley's recommendation, when considered in light of the evidence in the record, provides a readily discernable path to the decision to discharge petitioner without providing him with yet another opportunity for rehabilitation.

c. There is no merit to petitioner's contention (Pet. 14-17) that the decision in this case conflicts with *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978). *Matlovich* involved a constitutional challenge to Army regulations mandating the discharge of homosexuals from military service in the absence of "unusual circumstances." *Id.* at 855. The court declined to address the constitutional issue, however, and held instead that the Air Force had not provided a sufficient explanation as to whether there existed "unusual circumstances" sufficient to warrant retention of the plaintiff notwithstanding his admitted homosexuality. *Id.* at 855-857.

Matlovich did not establish a general rule that the military must supply formal findings and a written statement of reasons for every discharge. The court remanded because the regulation at issue did not specify any standards for deciding when unusual circumstances existed, *and* because there was no discernable explanation in the record explaining the agency's decision. As the court put it, "[t]he absence of articulated standards, policies, or considerations—*plus* the absence of any reasoned explanation in this particular case—makes it impossible to decide whether or not there has been an abuse of discretion in this instance or whether improper factors have played a material role." 591 F.2d at 856 (emphasis added). *Matlovich* is therefore consistent with the general rule that an agency's decision will be upheld when its "path may reasonably be discerned." *Bowman Transp.*, 419 U.S. at 286.

d. Petitioner also claims (Pet. 13-14, 20) that an abuse of discretion must be found because Colonel Windle declined to accept the recommendation of the administrative board. However, Army regulations expressly state that a board recommendation that discharge be "suspended" is not binding upon the separation authority. Army Reg. (AR) 635-200, *Enlisted Ranks Personnel*, para. 2-12b(6) (Oct. 17, 1990). Given the competing recommendation of petitioner's own company commander that the rehabilitation requirement be waived, it was not an abuse of discretion for Colonel Windle to reject the recommendation of the administrative board.

2. Petitioner also contends (Pet. 22-25) that counseling forms from a prior command should have been destroyed upon his transfer to a new unit and,

therefore, not used as support for his discharge. That contention does not warrant review.

Petitioner relies upon a statement printed at the bottom of the standardized counseling forms that the form "will be destroyed upon * * * reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement." Pet. App. D. The form also contains a legend, however, reciting that use of the form is governed by AR 635-200. See *ibid.* That regulation specifically provides that the soldier's entire military record from his current enlistment—including counseling records—should be considered in separation proceedings. AR 635-200, para. 1-17 (Oct. 17, 1990). Based upon the clear language of the regulation, the Court of Federal Claims correctly held that consideration of the forms at the administrative hearing was proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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